

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 September 2007

Case No.: 2006LHC01926

OWCP No.: 5-113785

In the Matter of:

T.B.,
Claimant,

v.

LANGLEY AERO CLUB,
Employer,

Appearances: Gregory E. Camden, Esq.
For Claimant

Roy M. Leonard, Esq.
For Employer

Before: Kenneth A. Krantz
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Nonappropriated Fund Instrumentalities Act, 5. U.S.C. §§ 8171-8173, *et seq.* an extension of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), as amended, 33 U.S.C. §§ 901-950, *et seq.*, which establishes a compensation scheme for longshore and harbor workers who suffer work-related injuries. In this case, Claimant T.B. alleges that he suffered a work-related back injury that prevents him from working and therefore is entitled to total disability benefits and associated medical benefits pursuant to the Act. On February 5, 2007, a formal hearing was held in Newport News, Virginia. The parties submitted stipulations, which were received into evidence and labeled as Joint Exhibit 1. Also at the hearing, Claimant's Exhibits 1 through 10, Employer's Exhibits 1 through

19, and Administrative Law Judge's Exhibit's 1 through 4 were admitted into the record.¹ Post-hearing, by leave granted by this Judge, Claimant submitted a note written by Dr. Barnum, dated January 10, 2007, which Claimant identified as Claimant's Exhibit 11. Based on that note, Claimant (ALJX 5) and Employer (ALJX 6) agreed to an additional stipulation. Post-hearing, both parties also each submitted a brief for this Judge's consideration.² Accordingly, the findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUE PRESENTED

At the hearing, the parties agreed that the only issue to be adjudicated in this matter is the extent of Claimant's disability, i.e. is Claimant totally or partially disabled? (TR 5-6, Employer's Br. 9.)

PROCEDURAL HISTORY

On August 12, 2002, Claimant filed a claim for compensation (LS-203). (EX 3.) By letter dated March 14, 2006, Employer's claims examiner notified Claimant's counsel that Claimant's compensation payments would be terminated after April 4, 2006, because Employer's carrier had not received any medical documentation regarding the treatment of Claimant's injury since 2004. (EX 4.) Thereafter, Employer filed a notice of controversion of right to compensation (Form LS-207), dated April 10, 2006, with the Office of Workers' Compensation Programs ("OWCP"). (EX 5.) On May 9, 2006, an informal conference was held. (CX 6, 8.) In a letter dated July 18, 2006, the OWCP claims examiner recommended that Claimant's benefits be reinstated "effective April 5, 2006, with permanent total disability payable from September 1, 2004 to the present and continuing, until such time as the [E]mployer identified suitable alternate employment." (CX 6.)

After the OWCP claims examiner issued her recommendation, Employer filed a notice of final payment or suspension of compensation payments (LS-208), dated October 4, 2006 with OWCP. (EX 7; CX 5.) Additionally, Employer filed another Form LS-207, also dated October 4, 2006, with the OWCP. (EX 6.) This time, Employer stated that the reason it was controverting Claimant's right to benefits was because Claimant had reached maximum medical improvement in September 2004, had thereafter been given permanent restrictions by his physician but was otherwise capable of working, and Employer had identified suitable alternate employment that was available to Claimant. (EX 6.) In its LS-207 and LS-208, Employer stated that there had been an overpayment of benefits following the completion of its labor market survey and therefore would begin paying Claimant benefits again once it had recaptured this alleged overpayment of benefits. (EX 6, 7.)

¹ The following abbreviations will be used as citations to the record: CX – Claimant's Exhibit; EX – Employer's Exhibit; JX – Joint Exhibit; ALJX – Administrative Law Judge's Exhibit; TR – Transcript of the February 5, 2007 hearing.

² Thereafter, by letter dated April 9, 2007, Claimant submitted a reply to Employer's brief, to which Employer objected. Claimant was not granted leave to submit this reply letter. Accordingly, Claimant's letter is being excluded from the record.

STIPULATIONS

In this case, Employer and Claimant have stipulated to, and I find, the following facts:

1. an employer/employee relationship existed at all relevant times;
2. the parties are subject to the jurisdiction of the Longshore & Harbor Workers' Compensation Act;
3. Claimant sustained an injury to his back on March 30, 2002;
4. a timely notice of injury was given by the employee to the employer;
5. a timely claim for compensation was filed by the employee;
6. the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;
7. Claimant's average weekly wage at the time of injury was six hundred and forty-three dollars and sixty-five cents (\$643.65), resulting in a compensation rate of four hundred and twenty-nine dollars and ten cents (\$429.10);
8. Claimant has been paid benefits as documented on the LS-208, dated October 4, 2006 (EX 7 and CX 5-1);
9. the parties agree that Claimant reached maximum medical improvement on September 9, 2004;
10. Claimant's treating physicians are Dr. Glenn Nichols and Dr. Michael Barnum; and
11. Dr. Barnum would testify that Claimant is unable to perform any position that would require the pushing and pulling of an airplane.

(JX 1, ALJX 5, ALJX 6.)

SUMMARY OF THE EVIDENCE PERTAINING TO THE EXTENT OF CLAIMANT'S DISABILITY

Testimony of T.B.

At the hearing, Claimant, who testified that he was seventy years old, stated that he has his GED and has completed 101 semester hours through Embry-Riddle Aeronautical University. (TR 18.) Claimant further stated that he was in the Air Force for nine years and the Army for twelve years. (TR 18.) He testified that, while on active duty, he worked as a senior aircraft maintenance supervisor and that in order to obtain the necessary training for this position, he had

to attend fourteen schools and had to obtain an A&P license from the Federal Aviation Administration (“FAA”), for which he had to successfully complete five written tests and two practicals.³ (TR 18-20.) At the hearing, Claimant also stated that he has a solo level pilot’s license, for which he had to go through ground school and pass an FAA test. (TR 20.) Claimant testified that in performing aircraft maintenance and repair work, he was required to read and interpret manuals on various aircraft and that he was qualified to work on all types of aircraft. (TR 20.) He testified that he had supervisory responsibilities throughout his military career. (TR 22.)

Claimant testified that after he retired from the military, he continued working with aircraft and, for a short time, painting and repairing dents in automobiles, before going to work for Employer. (TR 23-27.) Claimant testified that, while working for Employer, Claimant performed maintenance and inspections on twin engine and single engine airplanes. (TR 10-11.) He testified that he also provided some instruction to individuals attempting to obtain private pilot’s licenses and supervised the work of two volunteers. (TR 28-29.) Claimant stated that, as part of his job, he would have to lie along the seats of the planes so that he could check under the instrument panels/dashboards and make necessary repairs. (TR 11.) Claimant’s position also entailed “engine lifting, jacking the aircraft, lifting wings off, fuselage repairs, [and] crawling in and out of the ailerons.” (TR 11.) Claimant testified that he can no longer perform this type of work. (TR 11.) Claimant testified that his work injury occurred while he was pulling a twin engine plane out of a hangar. (TR 11-12.)

At the hearing, Claimant further testified that, after he was injured, he was initially treated by a Dr. Nichols, who referred him to a Dr. Barnum. (TR 12.) Claimant stated that Dr. Barnum first attempted to treat his back problem with epidural injections, which were ineffective. (TR 12.) Claimant testified that he therefore underwent surgery on March 30, 2004. (TR 12.) Claimant stated that he currently continues to have problems with his back, but that now, he “can at least talk without being interrupted with pain[.]” (TR 13.) He testified that he still cannot lie on his back. (TR 13.) Claimant further testified that if he remains seated for too long, he has to take a pill and lie down and that his back “just hurts all the time.” (TR 13.)

At the hearing, Claimant testified that between April 12, 2002 and July 2, 2002, he continued to work for Employer as a chief maintenance supervisor. (TR 14.) Claimant testified that during this time, he “just did paperwork” and “got some people to come in there and do the work.” (TR 14.) He stated that he resigned from that position because he “couldn’t do the work.” (TR 14.) Claimant testified that he “couldn’t turn [his] back[.]” and that he “couldn’t do anything really, ... [he would] bend over too long, [and] couldn’t straighten up.” (TR 14.) He stated that subsequent to his surgery in March 2004, Employer has not contacted him or offered him another position. (TR 15.) At the hearing, Claimant also testified that one of the positions, as an aviation instructor at Aviation Institute of Maintenance, that Employer alleges he can now perform, involves the same type of work that he performed while working for Employer. (TR 16-17.) Claimant testified that he knows what type of work the job entails because he worked as an instructor for the institute from March 1991 to June 1992 and he discussed the instructor job duties with his son, who attended the institute four years prior to the hearing. (TR 16-17, 34-35.) Claimant also testified that, subsequent to his accident, “everybody” was telling him to make an

³ Claimant later testified that he attended twelve schools. (TR 22.)

effort to get a job.⁴ (TR 31.) Claimant testified that, therefore, approximately six or seven months before the hearing, he applied for a “couple” of positions. (TR 30.) He testified that he filled out applications for positions as a driver with Hertz and Enterprise. (TR 30-31, 34.)

With regard to his current situation, Claimant testified that his daily activities typically include getting up, buying lottery tickets, and sometimes doing some shopping. (TR 31-32.) Claimant testified that he does not have a computer in his home and that he has not worked with computers for awhile. (TR 30.) Claimant stated that he was required to use computers for two of his prior positions that he held around 1991. (TR 30, 32.) Claimant testified that he is currently receiving disability retirement from the military and social security. (TR 28.) He explained that he is receiving military disability retirement for headaches, from which he has suffered since June of 1966. (TR 32-34.) He stated that he began receiving disability retirement in approximately 1983. (TR 33.)

Testimony of David Edward George, III

Mr. George, who has been a licensed private investigator in the state of Virginia since August 1994, was hired by Employer’s carrier to perform field surveillance and monitor Claimant’s activities. (TR 35-37.) Mr. George testified that he monitored Claimant’s activities on February 3, 4, and 6, 2006 and again in November and December 2006. (TR 37-38, 40.) At the hearing, Mr. George described his observations regarding Claimant. (TR 40-45.) He described Claimant as a “creature of habit.” (TR 40.) He testified that Claimant would generally leave his house between 9:00 a.m. and 1:00 p.m. (TR 40.) Mr. George stated that Claimant would then drive down the street to a nearby convenience store and sometimes to other locations, such as fast food restaurants, and then return home. (TR 40-40-41.) Mr. George testified that he never observed Claimant use any type of assistive walking device and that he never observed Claimant hesitate or show any outward signs of pain when Claimant entered or exited his vehicle or opened or closed doors to establishments that he visited. (TR 41-42.) He further testified that he never observed Claimant limp. (TR 43.) Mr. George stated that he never observed Claimant carrying anything heavier than a bag from a fast food restaurant or a coffee cup (i.e., heavier than 20 pounds) or do any repetitive bending, squatting, kneeling, or crawling. (TR 43-45.)

Testimony of Dorothy Parker

At the hearing, Ms. Parker, who is a vocational expert employed by GENEX, a vocational and medical consulting corporation, provided testimony regarding a labor market survey, dated August 30, 2006, that she compiled at the request of Employer’s carrier. (TR 48-88.) Ms. Parker testified that she is a certified case manager and certified rehabilitation counselor.⁵ (TR 52.) She stated that, in order to maintain her certifications, she must complete one hundred hours of continuing education every five years. (TR 54.) Ms. Parker stated that she has approximately fifteen or sixteen years of experience compiling labor market surveys and placing individuals who have been injured in new types of employment. (TR 53.) She testified that while she is not certified as a rehabilitation counselor with the Department of Labor, she is

⁴ At the hearing, Claimant’s attorney informed this Judge and Employer that Claimant had been provided with a copy of the jobs from Ms. Parker’s labor market survey. (TR 31.)

⁵ See also, EX 15.

familiar with the certification program. (TR 53, 55.) Yet, Ms. Parker also stated that she has never seen the Office of Workers' Compensation Programs vocational rehabilitation regulations and has never testified in a LHWCA case before or provided testimony concerning a labor market survey. (TR 56.) At the hearing, Ms. Parker stated that she has lived in the Hampton Roads area since May 2006. (TR 55.) She testified that between May and August 2006, she has completed four or five labor market surveys involving the Hampton Roads area. (TR 55.) Ms. Parker explained that she was unsure how many surveys she had performed before May 2006 because, when she lived in Richmond, she did surveys "from area to area." (TR 55.)

Ms. Parker testified that in the process of completing the survey, she met with Claimant one time. (TR 49-50.) Ms. Parker stated that during the meeting she obtained Claimant's employment history and educational level and administered a Wonderlic basic skills test. (TR 50-51.) She testified that the information she obtained from Claimant during that meeting was used to perform a transferable skills analysis. (TR 49-50.) At the hearing, Ms. Parker explained that a Wonderlic test is a twenty minute multiple choice exam that tests an individual's basic math and verbal skills. (TR 50-51, 59-60.) She testified that Claimant's results demonstrated that Claimant's skill levels were below the sixth grade level, although the test did not specify how far below the sixth grade level Claimant's skills ranked. (TR 60-61.) Ms. Parker stated that notwithstanding Claimant's low test scores, she had found Claimant to be very knowledgeable and explained that there are several reasons for why an individual might achieve low test scores: the individual is a poor tester, the individual was tired on the test day, the test site was too hot, etc. (TR 62, 82.) Ms. Parker testified that she did not find it necessary to retest Claimant. (TR 62, 85-86.) She stated that Claimant has his GED and had taken various courses while in the military. (TR 62.) Ms. Parker testified that she based her assessment of Claimant and her job analysis on her initial meeting with Claimant, the fact that Claimant has his GED, and on key components (e.g. management and teaching) that she noted in the job descriptions included in Claimant's "working resume." (TR 62-63, 82-83, 85-86.) Ms. Parker acknowledged that if the Wonderlic test was correct, the jobs she identified in her labor market survey would not be appropriate for Claimant. (TR 63.)

At the hearing, Ms. Parker testified that, with regard to Claimant's ability to reenter the workforce after not working for approximately four years, she believed that "it would be a little bit more difficult." (TR 79.) With regard to the specific jobs that she had identified in her job analysis, she testified that, with the exception of the aviation instructor position, she had experience placing individuals in each of those positions. (TR 84.) Ms. Parker testified that, for the regular duty job analysis, she either met with (aviation instructor position) or spoke to by telephone (all other positions) each individual identified under each position included in the job analysis. (TR 51.) Ms. Parker testified that she personally wrote the job descriptions specified on the forms based, in the case of municipal jobs, on the standard job descriptions provided by the municipalities and, in the case of other jobs, on the information provided by the contact individuals listed on the job forms. (TR 57-59, 81-82, 86-88.)

With regard to the auto parts delivery job with Prime Products, Ms. Parker testified that the address of the employer listed on the job form was incorrect, although the phone number listed on the form was correct. (TR 63.) Ms. Parker further stated that, in her opinion, the auto parts delivery job, which Dr. Barnum did not approve, was different than the driver positions she

identified in her job analysis because it required more physical activity (lifting) than the driver positions. (TR 75-77.)

With regard to the driver positions with the rental car companies that she identified in her job analysis, Ms. Parker testified that new drivers are trained, although the training is not extensive. (TR 85.) Ms. Parker testified that, with regard to the Avis Rent-a-Car and Triangle Rent-a-Car positions, the only difference between the positions that she noted, which would explain why Dr. Barnum approved the Avis position but rejected the Triangle position, was that the Triangle position required more standing and walking. (TR 77-78.) Yet, Ms. Parker stated that she was not informed of whether Claimant had walking or standing restrictions and acknowledged that she did not know why Dr. Barnum approved one driver position and rejected the other. (TR 77-78.)

With regard to the position as a service manager at Lincoln Military Housing, Ms. Parker testified that she was unable to verify the physical requirements for the position or the wage paid and therefore was not asserting that the position would be an appropriate job for Claimant. (TR 63-64.) With regard to the Newport News deputy clerk position, Mr. Parker testified that she believed Claimant was capable of performing the job, although she acknowledged that the position could require the use of computers and that she had no knowledge regarding whether Claimant has any of the necessary computer skills required for the position. (TR 78-80.) Ms. Parker also testified that training is provided for new dispatchers. (TR 85.) Similarly, Ms. Parker stated that, for the Chesapeake 911 dispatcher position, the position would require computer use but also that Claimant would be trained to perform the job. (TR 84, 88.)

With regard to the aviation instructor position with the Aviation Institute of Maintenance (“AIM”), Ms. Parker could not explain why the typewritten job form was different than her handwritten version of the form. (TR 65-67.) Mr. Parker testified that the reason she spoke to the AIM contact person directly, rather than by phone, like she had done for the other jobs, was because she had never placed anyone in an aviation school position before and wanted to “know about where it was and about it.” (TR 72.) Ms. Parker testified that the contact person specified on the handwritten job form, James Kinsey, is the associate director of AIM. (TR 64.) She testified that she first spoke to Mr. Kinsey regarding the aviation instructor position, but then completed her inquiry with someone named Christina, who is the individual who actually signed the form. (TR 64-65.) She further stated that the contact person specified on the typewritten job form, Michelle the receptionist, was incorrect and that the correct contact person was Christina, who she was told “knew the jobs.” (TR 64-65.) Ms. Parker testified that she did not know what position Christina held at AIM. (TR 65.) Ms. Parker further testified that the handwritten job form was the correct version. (TR 65-67.) With regard to the handwritten form, when asked why the job description did not mention climbing incline and vertical ladders, Ms. Parker testified that she was told that it was a teaching position only and that Claimant would not have to climb ladders. (TR 67-68.) When asked how Claimant would teach students about the mechanics of the dashboard without getting into the plane, Ms. Parker stated that she “[didn’t] know unless [AIM] [had] a simulator.” (TR 68.) Ms. Parker testified that she did not know how large of a school AIM was. (TR 68.) Ms. Parker also acknowledged that, while she assumed the lifting requirement for the job was less than twenty pounds, it was possible that Dr. Barnum approved the aviation instructor position because there was no lifting requirement specified on

the form (the information was marked out). (TR 69-70.) Ms. Parker further testified that after receiving a copy of a letter written by Michael Huffman, the Student Director at AIM, which stated that an aviation instructor might have to push and pull planes and engines, climb ladders, and lift tools and equipment not usually over fifty pounds, she informed Dr. Barnum of these new potential job requirements and that Dr. Barnum had stated that he would have to then reevaluate the position and that Claimant would not be able to perform those physical activities. (TR 73-75.) She stated that after receiving the letter, she had attempted to contact AIM for clarification, but that no one would speak with her. (TR 83-84.)

Memorandum written by Robert L. Sampe, Manager of Langley Aero Club (EX 8)

In a memorandum dated July 3, 2002, Mr. Sampe wrote that Claimant had been out due to back pain, but had returned to work that day with a doctor's note, which stated that Claimant "should be placed in a position that would allow him to accomplish light work with no bending or placing his back in an unusual posture." Mr. Sampe further wrote that Claimant had been allowed "to remain in his original position with light work to allow him not to have to bend or place his back in [an] unusual posture" and that "[b]y placing [Claimant] on light duty we hope to get him back to a productive team member status."

Claimant's resignation letter (EX 9)

By letter dated July 16, 2002, Claimant notified Employer that he was resigning from his position as Chief Mechanic at Langley Aero Club for medical reasons and that his last day of employment would be July 30, 2002.

Medical opinion by Dr. Barnum (EX 10, CX 6-4)

In response to a letter sent by the Office of Workers' Compensation Programs claims examiner assigned to this case, dated May 12, 2006, Claimant's physician Dr. Barnum wrote that he opined that Claimant had reached maximum medical improvement in September 2004. Moreover, while Dr. Barnum did not believe that Claimant would be able to perform his regular job as a mechanic supervisor, he opined that Claimant could work with restrictions. Specifically, Dr. Barnum wrote that Claimant could not perform work that would require him to lift more than twenty pounds or perform repetitive twisting, bending, squatting, kneeling, or crawling.

Vocational Report (EX 12)

In an undated vocational report, Ms. Parker set forth Claimant's vocational history, and her vocational plan. Under Claimant's vocational history Ms. Parker noted that Claimant received his GED in 1954, and that thereafter, Claimant worked from 1954 through 1957 as a jet engine mechanic for the U.S. Air Force; from 1957 through 1958 as a Machinist for Princess Ann Carton; from 1958 through 1963 as a jet engine technician for the U.S. Air Force; from 1963 through 1968 as a chief technical inspector for the U.S. Army; from 1968 through 1969 as a field service representative for Pratt and Whitney; from 1969 through 1976 as a senior aircraft maintenance instructor for the U.S. Army; through 1977 as an auto mechanic for Checkered Flag Motor Sports; from 1977 through 1979 as an aircraft worker for the Naval Air Force Facility;

from 1979 through 1987 as a maintenance specialist/field service representative for GE; from 1987 through 1991 as a field service representative for Pratt and Whitney; from 1991 through 1992 as a senior instructor for a training school;⁶ from 1992 through 1993 as a maintenance technician for Checkered Flag; and beginning in 2000 as an aircraft maintenance technician for Langley Aero Club. Under the vocational plan section of the report, Ms. Parker noted that the vocational issues identified on August 4, 2006 included Claimant's age, restrictions, and low test scores. Ms. Parker did not write a date in the space provided under the heading "date resolved." She noted under the heading "Vocational Goals" that her goal was to complete the labor market survey by September 7, 2006, which was the next report date. Attached to the report is a printout of the results of the transferable skills analysis performed by a computer program called OASYS.⁷

Labor Market Survey (EX 13)

In a labor market survey ("LMS"), dated August 30, 2006, Ms. Parker summarized the results of her job survey conducted between August 23 and 30, 2006. In the LMS, Ms. Parker noted that the geographic area surveyed encompassed the Virginia Beach/Hampton Roads, Virginia area. In the LMS, Ms. Parker also noted the purpose of her assignment; the resources she reviewed, which included Claimant's medical records, OASYS results, the transferable skills analysis ("TSA"), Wonderlic, and her initial interview with Claimant; and the background information regarding Claimant's injury and prior medical treatment, as well as when Claimant reached maximum medical improvement and the physical restrictions specified by Dr. Barnum, which permitted Claimant to only perform jobs classified as "light" under the Dictionary of Occupational Titles system.

Thereafter, Ms. Parker noted Claimant's vocational and educational histories and Claimant's Wonderlic test results and the results of the TSA:

VOCATIONAL HISTORY:⁸

Years	Position	Employer
5 years	Field Service Rep	Pratt & Whitney
8 years	Superintendent, Maintenance	GE
8 years	Field Service Engineer	ARMY
2 years	Precision Assembler	NAVAL Air
2 years	Automobile Mechanic	Checkered Flag
7 years	Supervisor Aircraft Maint.	ARMY
5 years	Inspector, Air Carrier	Air Force
< 1 years	Meat Cutter	Little Creek Comm
9 years	Target Aircraft Tech	Air Force
9 years	Maintenance Machinist	Air Force

⁶ Claimant testified that this position was with Aviation Institute of Maintenance. (TR 16-17.)

⁷ (TR 49-50.)

⁸ The Dictionary of Occupational Titles numbers for the positions, which are included in Ms. Parker's report, have been omitted.

EDUCATIONAL HISTORY[:]

GED 1954⁹

During a 20 year period, [Claimant] completed 21 courses in Aircraft/Engine Service School. These courses were evaluated by Embry Riddle Aeronautical University and account for 91 semester hours by their standards.

[Claimant] also holds the Professional License of A&P License.¹⁰

VOCATIONAL TESTING[:]

Wonderlic Basic Skills Test

Summary	Total	GED Level	Grade Level
Verbal Skills	165	1	<6
Quantitative Skills	125	0	<6
Skills Composite	145	0	<6

ANALYSIS OF TRANSFERABLE SKILLS:

The vocational case manager performed the Transferable Skills Analysis using OASYS on 08-11-06.

PHYSICAL DEMAND:

[Claimant's] work history indicates that he has performed jobs at the Medium physical demand level.

GENERAL EDUCATION DEVELOPMENT:

In regard to general educational development, the following levels were noted:

Reasoning: 5
Math: 5
Language: 5

SPECIFIC VOCATIONAL PREPARATION:

Level:

Maximum 8 (4-10 years)
Minimum 6 (1-2 years)

APTITUDES:

General Learning Ability 1 (above 89%)
Verbal Aptitude 1
Numerical Aptitude 1

⁹ The name of the high school that awarded Claimant's GED has been omitted.

¹⁰ The license number has been omitted.

Spatial Aptitude	1
Form Perception	2 (67%-89%)
Clerical Aptitude	3 (34%-66%)
Motor Coordination	3
Finger Dexterity	3
Manual Dexterity	2
Eye-Hand-Foot Coordination	4 (10%-33%)
Color Discrimination	4

TEMPERAMENTS:

Directing, controlling, planning
Performing a variety of duties
Attaining precise limits/tolerances
Dealing with people
Making judgments and decisions

(EX 13 at 2-4 (emphasis omitted).)

Thereafter, Ms. Parker set forth the results of her job analysis. She noted that she contacted employers between August 22 and 30, 2006. In her report, Ms. Parker identified eight positions, for which various employers were then currently hiring, that she felt Claimant was qualified to perform: one instructor position (Aviation Institute of Maintenance); three driver positions (Prime Products, Triangle Rent-a-Car, and Budget Rent-a-Car); three dispatcher positions (City of Chesapeake, Jack's Towing; and AAA of Tidewater); and one service manager position (Lincoln Military Housing). In concluding her report, Ms. Parker noted that she calculated Claimant's average weekly wage to be \$294.00. Attached to her report were the regular job duty analysis forms that were to be submitted to Claimant's treating physician for review.¹¹

Regular Duty Job Analysis Forms signed by Dr. Barnum (EX 14)

Employer's Exhibit 14 includes ten Regular Duty Job Analysis Forms for nine different positions, of which Dr. Barnum approved seven:

Aviation Instructor/Maintenance Technician – Aviation Institute of Maintenance¹²

- Hours per week: 40
- Wage: commensurate with salary
- Duties/Requirements: teaching; light maintenance; and instructing in maintenance procedures.

¹¹ The physical activities listed for three of the jobs on the regular job duty analysis forms attached to Ms. Parker's report are not identical to the descriptions that were submitted to and signed by Dr. Barnum: the dispatcher trainee position with the City of Chesapeake lists eight hours of sitting (EX 13 at 10); the auto parts delivery positions with Prime Products lists a twenty pound lifting requirement (EX 13 at 8); and the driver position with Budget Rent-a-Car lists less than one hour of walking and seven hours of sitting (EX 13 at 14).

¹² See also, CX 9-1.

- Physical Activities: 1 hour reaching above shoulder height, working with arms extended at shoulder level, and climbing inclined ladders/stairs; 2 hours standing, walking, sitting; and the ability to lift 20 pounds
- Not approved on September 14, 2006

Aviation Instructor – Aviation Institute of Maintenance

- Hours per week: full or part time
- Wage: anticipated wage is \$42,700
- Duties/Requirements: instructing students in mechanics
- Physical Activities: 0-1 hour of stooping; 1-2 hours of pushing and pulling; 2-3 hours of reaching above shoulder height, working with body bent over at waist, working with arms extended at shoulder level; 4-5 hours standing, sitting, and walking (based on instructor's preference); and no legible lifting requirement
- Signed by employer representative on October 18, 2006
- Approved on October 20, 2006, so long as reaching and bending activities are not constant for 3 hours

Deputy Clerk I – City of Newport News

- Hours per week: 40
- Wage: \$21,934
- Duties/Requirements: perform public contact work in the Circuit Court Clerk's office, process new cases, perform services related to existing cases, issue marriage licenses and subpoenas, answer telephone inquiries, assist customers at the front counter, and other duties, as assigned
- Physical Requirements: less than 1 hour of reaching above shoulder height, stooping, and walking; less than 3 hours of standing; 5 hours of sitting; and the ability to lift 20 pounds
- Approved on October 20, 2006

Dispatcher – Jack's Towing

- Hours per week: 40
- Wage: \$6.00-\$7.00
- Duties/Requirements: light work; dispatch drivers; paperwork; excellent oral communication skills; decision making skills; task oriented; and training will be provided
- Physical Activities: 1 hour of walking; 6 hours of sitting; and the ability to lift 15 pounds
- Approved, but date of approval not specified

Dispatcher Trainee – City of Chesapeake

- Hours per week: 40
- Wage: \$25,676
- Duties/Requirements: typing ability; decision making skills; multi-tasking ability; excellent oral communication skills; position requires wearing a headset and limited physical movement; viewing computer displays for extended periods of time; and training will be provided
- Physical Activities: 6 hours of sitting and no required lifting
- Approved on September 14, 2006

Dispatcher – AAA of Tidewater

- Hours per week: 40
- Wage: \$9.00 per hour
- Duties/Requirements: Using a variety of communication channels: dispatch road assistant drivers, determine the type(s) of service required by members; prioritize calls and make sure proper authorities are notified; monitor activity to assure that assistance is rendered efficiently and in a timely manner; document services performed; maintain communication with drivers, members, and facilities providing services; and explains and recommends AAA products and services to members
- Physical Activities: 8 hours, or as needed, of sitting and no required lifting
- Approved on September 14, 2006

Driver – Budget Rent-a-Car

- Hours per week: 40
- Wage: \$320.00
- Duties/Requirements: pick up cars at the airport and deliver them to the service area; return cars to the lot; shuttle cars to various lots; occasionally shuttle customers; and have a good DMV report
- Physical Activities: less than 1 hour of walking; 8 hours, or as needed, of standing and sitting; and the ability to occasionally lift 10 pounds.
- Approved on September 14, 2006

Driver – Avis Rent-a-Car

- Hours per week: 40
- Wage: \$300.00
- Duties/Requirements: transport cars from airport to service area; transport customers; Norfolk Terminal; and have a good DMV report
- Physical Activities: less than 1 hour of walking; 7 hours of sitting; and the ability to occasionally lift 10 pounds.
- Approved on September 14, 2006

Driver – Triangle Rent-a-Car¹³

- Hours per week: 40
- Wage: \$280.00
- Duties/Requirements: drive vehicles from point A to point B; drive automatic transmission vehicles; customer service; fuel vehicles; and perform visual inspections of vehicles
- Physical Activities: 1 hour of standing and walking; 6 hours of working with arms extended at shoulder level and sitting; and no required lifting
- Not approved on September 14, 2006

¹³ See also, CX 9-3.

Auto Part Delivery Driver – Prime Products¹⁴

- Hours per week: 40 +
- Wage: minimum wage
- Duties/Requirements: deliver auto parts; drive a small pick-up truck; and sit/drive most of shift
- Physical Activities: 1 hour of standing and walking; 6 hours of sitting; and the ability to lift approximately 20 pounds
- Not approved on September 14, 2006

Investigative Reports (EX 16 and 17)

Employer's Exhibits 16 and 17 are investigative reports that document Claimant's activities, as observed by Investigators George and Edmondson, which occurred on February 3, 4, and 6, 2006; November 25, 2005; and December 2, 5, 6, and 7, 2006. Overall, these reports document that Claimant would leave his home for one to five hours at a time; that during these trips, Claimant would regularly drive to a nearby convenience store, fast food restaurant, and/or bank; and that, on a few occasions, Claimant drove to other establishments in the Tidewater area. The reports further note that Claimant was never observed using braces or other medical devices and that Claimant moved in a normal manner. On several occasions, Claimant was observed carrying lottery tickets that he had purchased from the convenience store or bags of food that he had purchased from the fast food restaurant. Claimant was observed, on several occasions, placing bags of fast food in the backseat of his car. On one occasion, Claimant was observed adjusting a fencepost in his yard.

Medical Records (EX 18)

Employer's Exhibit 18 is comprised of Claimant's medical records dated June 10, 1998 to November 13, 2006. The records document that Claimant was in a car accident in June 1997, which resulted in injury to his back and right knee. (EX 18 at 1.) Thereafter, the records note that Claimant "went on to heal satisfactorily" from his various ailments and returned to work, but eventually suffered injury to his lower back while attempting to pull a twin-engine plane out of a hangar in March 2002. (EX 18 at 4.) In a treatment note dated July 3, 2002, Claimant's treating physician, Dr. Glenn Nichols, wrote that Claimant would continue to be treated "as needed for symptomatic control of his pain" and that Claimant was "fit for sedentary work only and was given a note stating such." (EX 18 at 7.) A treatment note dated March 31, 2003 documents that Claimant was still experiencing pain at that time and that he experienced "[l]ittle change with the injection." (EX 18 at 8.) In a note dated May 9, 2003, a Dr. Lawrence Morales wrote that Claimant's back felt much better at the time and that Claimant could "do most things except bend[] forward" or lift anything. (EX 18 at 9.) The records further document that on January 13, 2004, Claimant underwent a L4 and L5 laminectomy and foraminotomy, L4 to L5 fusion with instrumentation, and repair of a dural tear, which were performed by Dr. Barnum. (EX 18 at 13-16.) Following Claimant's surgery, the records document that from February 4, 2004 through September 1, 2004 Claimant's back pain subsided to the point that Claimant was only experiencing a mild amount of pain and was "having minimal symptoms." (EX 18 at 17-19.)

¹⁴ See also, CX 9-2.

Thereafter, on November 13, 2006, Claimant returned to see Dr. Barnum, who wrote the following comments:

... [Claimant] is currently complaining of multiple symptoms including upper back pain, lower back pain, right shoulder pain ... He is going to be going to the VA [to have] that evaluated. Due to the dramatic change in his symptoms all of a sudden, this happens to be coinciding with the push for him to return to work, I am going to get a CT and MRI of his lumbar spine just to make sure that there is nothing else going on in his lumbar spine. I am going to see him back after these are obtained.

(EX 18 at 20.) In a handwritten note dated November 14, 2006, Dr. Barnum noted that Claimant's work status had not changed. (EX 18 at 20.)

Returned certified mail sent to Prime Products and Avis Rent-a-Car (CX 1 and 2)

Claimant's Exhibits 1 and 2 include copies of subpoenas *duces tecum* that were mailed to Prime Products (CX 1) and Avis Rent-a-Car (CX 2) but returned to Claimant's counsel because they could not be delivered.

Job descriptions written by employers hiring for position identified by Ms. Parker in her labor market survey (CX 2-2, 3-1, and 4)

In a letter dated November 22, 2006, Michael Huffman, School Director of the Aviation Institute of Maintenance attempted to "describe as completely as possible the minimum requirements for [an instructor] position like that at [the Institute]":

First, the applicant must possess a "Mechanics Certificate" from the FAA with an Airframe & Powerplant rating. Next, the applicant must have four years of experience in the field of aviation maintenance. Aviation instructors work a standard 40 hour week with the possibility of overtime. There are two shifts that one might work; 7am to 3:30pm or 3pm to 11:30pm. The physical environment in which an instructor would teach consists of both classroom and laboratory (aircraft hanger). In the classroom an instructor may be either sitting or standing and this could be as much as 6 hours per day. Many times instructors must work outside in the elements as part of laboratory instruction which may also be up to 6 hours per day. In the lab environment an instructor might be required to climb ladders, lift tools and equipment not usually over 50 pounds. The instructor might also be required to push airplanes and/or airplane engine stands around to facilitate instruction and safety. The instructor would be required at times to wear protective gear such as respirators, gloves and welding helmets as directed by the curriculum. The instructor must also be able to communicate both verbally and in writing.

(CX 2-2.)

In a letter dated December 1, 2006, Nancy Horne, the Human Resources Administrator for the City of Chesapeake described the job requirements of a dispatcher trainee. (CX 4.) Ms. Horne noted that at the time, all dispatchers were being required to work mandatory overtime, which meant that they had to “work two 12-hour days per week.” (CX 4-1.) She stated that normal work hours for dispatchers, including trainees, were “8 hours per shift with two 15-minute breaks and one 30-minute meal break.” (CX 4-1.) Ms. Horne wrote that, in general, dispatchers are required to sit or stand at their workstations for extended periods of time (8 to 12 hours) and that other physical requirements are minimal or non-existent. (CX 4-1.) She noted that Dispatchers are required to type, write, speak, multi-task, and make curtail decisions constantly while they work. (CX 4-1.) Additionally, the job description attached to Ms. Horne’s letter stated that dispatchers were required to answer emergency phone calls; record essential information; dispatch emergency personnel; assist emergency personnel by providing information; maintain basic logs, charts, and records; operate equipment such as computers, printers, playback systems, CAD, and other systems; maintain a library of emergency reference materials; attend meetings, conferences, classes, and seminars to improve technical skills; and perform routine office tasks such as typing, filing, faxing, phoning, and copying. (CX 4-3.) The job description further noted the following requirements:

- Data Involvement (“[s]ummarize[], tabulate[], or format[] data or information in accordance with a prescribed schema or plan”);
- People Involvement (“[s]peak[] or signal[] to people to convey or exchange information”);
- Involvement with Things (“[h]andle[] or use[] machines and equipment that require moderate instruction and experience such as electronic telecommunications equipment, the application of custom or commercial emergency management software, and other complex software or systems”);
- Reasoning Requirements (“[p]erform[] coordinating work involving guidelines and rules but solve[] problems constantly”);
- Mathematical Requirements (“[p]erform[] addition and subtraction, multiplication and division”);
- Language Requirements (“[r]ead[] routine sentences, instructions, regulations, procedures, or work orders; write[] routine sentences and complete[] routine job forms and incident reports, speak[] routine sentences using proper grammar”);
- Mental Requirements (“[p]erform[] clerical and technical tasks requiring a wide range of procedures and requiring intensive division of a restricted field or complete familiarity with the functions of a unit or small division of an operating agency; requires normal attention with short periods of concentration for accurate results or occasional exposure to unusual pressure”);
- Judgments and Decisions (“[g]uide[] others making a few decisions, affecting the individual and a few coworkers”);
- Vocational/Educational Preparation (“high school, GED, or specialized vocational training in telecommunications”);
- Special Certifications and Licenses (special skills or equipment certification required);
- Experience Requirements (none);

- Physical and Dexterity Requirements (“sedentary work that involves walking or standing some of the time, exerting up to 10 pounds of force on a recurring basis, and sustained keyboard operations”);
- Environmental Hazards (none); and
- Sensory Requirements (“normal visual acuity and field of vision, hearing, speaking, and color perception”).

(CX 4-3-5.)

In a letter dated December 4, 2006, an unnamed employee of Jack’s Towing, summarized the minimum job requirements of the dispatcher position:

Shift of 8 hours; no experience needed as we train our dispatchers for our business, no education requirements, but we prefer high school graduate, only physical requirement is sitting, but can move about, up and around when not dispatching or answering phone.

Shift responsibilities include, but not limited to, answering phone in regards to assistance needed with vehicle to be towed, date and time, location of vehicle, make, model, color, licenses plate etc. of vehicle, dispatching tow truck with information required to locate and tow vehicle; if vehicle come through gate, car details must be called or faxed to local police department of the city in which vehicle towed. We prefer clear enunciation of information, not only on phone but over radio. A person needs to be able to do detailed work as details in towing is an absolute necessity.

Also, empty office trash can to outside can for pickup as well as cleaning up behind yourself.

(CX 3-1.)

Medical Records of Dr. Michael Barnum (CX 10)

Claimant’s Exhibit 10 is comprised of the medical records of Claimant’s treating physician Dr. Barnum. The records document Claimant’s treatment from April 21, 2006 through January 17, 2007. The records note that during this time, Claimant was experiencing pain in his back, which was being treated with periodic epidural injections. (CX 10-1 to 10-9.) Claimant’s records contain a MRI study (CX 10-9 to 10-10) and a CT study (CX 10-11 to 10-12). In a final treatment note, dated January 17, 2007, Dr. Barnum, after reviewing the results of Claimant’s MRI and CT studies, made the following comments:

... We obtained a CT scan and MRI of [Claimant’s] lumbar spine. He does have a mild amount of adjacent segment disease at the L3-4 level but nothing that I would recommend surgical intervention on. He has had a series of epidural injections and it is too soon to perform any more injections. Because of the nature of his problem, I don’t think any physical therapy is warranted at this time. I

think with regards to his lumbar spine, he is at a point of maximum medical improvement. I would like to obtain a function[al] capacity evaluation to see exactly what he is capable of in a work situation. This is going to be ordered for him today. I will see him back after that is obtained.

(CX 10-13.)

Note written by Dr. Barnum (CX 11)

In a note written by Dr. Barnum, dated January 10, 2007, Dr. Barnum wrote:

After speaking with patient and case manager for clarification of [the] job description I amended my original Decision on [the] Aviation Instructor job. However today I was made aware the position may include pushing and pulling planes. If so I would further amend.

DISCUSSION

In the Fourth Circuit, in order to determine the extent of Claimant's disability, I must consider the evidence of record in light of a shifting proof scheme. *Universal Maritime v. Moore*, 126 F.3d 256, 264, 31 BRBS 119, 124 (CRT)(4th Cir. 1997). Initially, Claimant must establish that he is incapable of returning to his prior employment. *Id.* Thereafter, "the burden shifts to the employer to prove that the claimant is not totally disabled by presenting evidence of other jobs that are available in the relevant geographic market for which the claimant is physically and educationally qualified." *Id.* (internal citation omitted). To satisfy this burden, the employer must demonstrate that *a range of jobs* exists that is reasonably available and can realistically be secured and performed by the disabled claimant. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). If the employer establishes that suitable alternate employment is available, the burden then shifts back to the claimant to show that he diligently tried and was unable to secure employment. *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201-02, 16 BRBS 74, 76 (CRT)(4th Cir. 1984).

In this case, Employer concedes that the evidence of record, *see, e.g.*, EX 10, EX 18 at 7, and TR 13, establishes that Claimant is unable to return to his prior employment. (Employer's Br. 9.) Accordingly, the burden is on Employer to prove that there is suitable alternate employment available to Claimant. In this case, after reviewing the evidence of record, although I find that several of the jobs proffered by Employer do not constitute suitable alternate employment, I find that Employer has met this burden.

First, with regard to the "light-duty position" Employer offered to Claimant on July 3, 2002, following his accident, *see* EX 8, I find that, under the circumstances of this case, the position did not constitute suitable alternate employment during the period when it was made available to Claimant. *See Monta v. Navy Exchange Service Command*, 39 BRBS 104, 108 (2005)(stating rule that an "offer of a job which is too physically demanding for the employee to perform ... does not constitute suitable alternate employment" (internal citation omitted)). Notably, at the hearing, Claimant testified that, as a result of his physical problems, which were

caused by his work-related injury, he could not perform the light-duty work that he was assigned at Employer's facility. (TR14.) In this case, Claimant's testimony is uncontradicted by any other evidence of record. Moreover, Claimant's testimony regarding the extent of his injury-related physical problems (TR 14) and pain (TR 13) are corroborated by Claimant's resignation letter, which states that Claimant was resigning from his position as chief mechanic because of his medical problems (EX 9), and Claimant's medical records, which document the severity of Claimant's injury-related problems throughout the year following his accident (EX 18 at 3-12). Accordingly, in this case, I find that Employer has not established the availability of suitable alternate employment by offering Claimant a light-duty position in its facility.¹⁵

Next, with regard to the aviation instructor position with the Aviation Institute of Maintenance, I note that, while Ms. Parker testified that it was her understanding that the position would only involve teaching (TR 68), Claimant testified at the hearing that the aviation instructor position involves the same type of physical work as his position at Employer's facility (TR 16, 26, 34-35). In this case, in view of Claimant's demonstrated familiarity with the position (TR 16-17, 26), I find Claimant's assessment of what the job entails to be much more credible than Ms. Parker's assessment. Moreover, in this instance, I note that Claimant's testimony is corroborated by the job description written by Michael Huffman, the Institute's School Director. (CX 2-2.) Accordingly, under these circumstances, I find that, in view of Claimant's physical restrictions and Dr. Barnum's opinion that Claimant cannot perform the job duties of this position if it involves pushing and pulling planes, the aviation instructor position does not constitute suitable alternate employment.

Similarly, I do not find that the dispatcher positions with either the City of Chesapeake or AAA, or the deputy clerk position with the City of Newport News constitute suitable alternate employment. Overall, based on the evidence of record, I find that Claimant would only have a realistic chance of securing any of these positions if he had at least a general understanding of computers and other modern technology and at least basic typing skills. (*See* TR 80 and 88; CX 4; EX 14 at 6, 9, and 10.) In this case, based on the evidence of record, I find that Claimant, who does not currently own a computer and apparently last used a computer over fifteen years ago, does not have the requisite computer, technology, or typing skills necessary to realistically compete for and perform these jobs.¹⁶ Overall, while it may be true that these employers would be willing to provide job training for new hires, I find it unreasonable to believe that an applicant such as Claimant would have a realistic hope of securing a position that requires the use of computers and other forms of modern technology as a basic part of the regular duties of the job.¹⁷

¹⁵ I note that Claimant's undisputed testimony establishes that Employer has not offered Claimant a light-duty position at its facility following the date of Claimant's surgery. (TR 15.) Moreover, in this case, no evidence has been introduced that specifically addresses whether a light-duty position with Employer would now constitute suitable alternate employment given Claimant's current physical condition and the physical restrictions recommended by Dr. Barnum.

¹⁶ I note that Claimant's testimony regarding this matter is uncontradicted by any other evidence of record.

¹⁷ In view of the fact that Ms. Parker apparently has no knowledge regarding Claimant's computer skills, *see* TR 80, I find that Ms. Parker's opinion, that these positions constitute suitable alternate employment, is neither credible nor persuasive.

Moreover, in this case, I further find that the driver position with Triangle Rent-a-Car and the auto parts delivery position with Prime Products do not constitute suitable alternate employment because they were not approved by Dr. Barnum. In this instance, although it is not particularly clear why Dr. Barnum rejected these positions,¹⁸ I find that Dr. Barnum's opinion is entitled to deference, in view of the fact that Employer bears the burden of proof at this stage of the proceedings and the fact that Employer has otherwise failed to produce any evidence demonstrating that Claimant is physically able to perform the work associated with these positions. Moreover, I find that Dr. Barnum's opinion is entitled to deference in this case because, as previously discussed, Dr. Barnum is one of Claimant's treating physicians and is the physician who prescribed Claimant's current restrictions.

Additionally, with regard to the service manager position with Lincoln Military Housing, I find that there is insufficient information regarding this position to determine whether it in fact constitutes suitable alternate employment. Notably, there has been no evidence submitted in this case that specifies the wage, job duties and requirements, or physical activities associated with this position. Indeed, Employer's own vocational expert stated at the hearing that, in view of her inability to verify the foregoing information, she did not assert that the position would be an appropriate job for Claimant. (TR 63-64.)

Finally, with regard to the driver positions with Avis Rent-a-Car and Budget Rent-a-Car and the dispatcher position with Jack's Towing, I find that the evidence of record establishes that Claimant possesses the intellectual and physical ability necessary to realistically secure and perform these jobs. Overall, in view of Claimant's work history and associated skills and experience, as described by Claimant at the hearing, I find it unreasonable to believe that Claimant lacks the intellectual ability and skills necessary to perform these positions. Notably, notwithstanding the fact that Claimant may have recently scored below the sixth grade level on the Wonderlic skills assessment, Claimant's testimony at the hearing clearly establishes that Claimant has experience dealing with customers/providing customer service, analyzing and solving problems, interpreting complex and technical instructions, supervising and providing instruction to other individuals, and completing paperwork. (TR 14, 17-30.) Additionally, the surveillance reports submitted by Employer document that Claimant is capable of driving an automobile. (EX 16 and 17.) Moreover, based on my own observations of Claimant at the hearing, I find that Claimant is very articulate. Accordingly, based on Claimant's testimony and my observations of Claimant at the hearing, I find that Claimant has the intellectual ability and necessary skills to perform these jobs.

With regard to whether Claimant is physically able to perform these jobs, I first note that, notwithstanding Claimant's age or the fact that Claimant has not worked for over four years, I do not find Claimant's uncorroborated testimony regarding the current extent of his back injury-related symptoms to be very persuasive in view of the investigative reports proffered by

¹⁸ Dr. Barnum provided no explanation for why he found these positions to be unsuitable. On the other hand, I do note that the auto parts delivery position would require Claimant to lift "approximately" 20 pounds, which could mean that Claimant would be required to lift more than twenty pounds. Additionally, with regard to the driver position, I note that the job description states that, in addition to driving vehicles, Claimant would have to also fuel and visually inspect vehicles as part of his regular job duties. Accordingly, Dr. Barnum may have felt that this driver position would require repetitive twisting or squatting, which I note are not specifically listed under the physical activities on the Regular Duty Job Analysis form.

Employer, *see* EX 16 and 17, and the fact that Dr. Barnum approved all three positions. Again, I note that Dr. Barnum's opinion, that Claimant is able to perform the physical duties associated with these positions, is uncontradicted and that Dr. Barnum is one of Claimant's treating physicians and is the physician who prescribed Claimant's current physical restrictions. Moreover, based on my observations of Claimant at the hearing, I find that Claimant has the stamina and physical ability to perform the physical activities associated with these positions. Accordingly, under these circumstances, I find that the driver positions with Avis Rent-a-Car and Budget Rent-a-Car and the dispatcher position with Jack's Towing constitute suitable alternate employment in this case. Thus, having established the availability of at least three positions, Employer has demonstrated that a range of jobs exists that is reasonably available and can realistically be secured and performed by Claimant.

Accordingly, Claimant now bears the burden of proving that he diligently attempted, but was unable to secure, employment. In this case, I find that Claimant has failed to meet this burden. Overall, I find that Claimant's testimony, that he attempted to secure a job by filling out applications for driver positions with Hertz Rent-a-Car and Enterprise Rent-a-Car, TR 30-31, 34, to be unpersuasive and insufficient to establish that he diligently searched for employment. Indeed, in this instance, the evidence establishes that Claimant did nothing more than submit these two applications. Notably, there is no evidence that these companies were even hiring during the relevant time period or that Claimant ever attempted to follow-up with these employers after submitting his applications. Moreover, I find the fact that Claimant was aware that other car rental companies were actually hiring during the relevant time period,¹⁹ yet elected not to apply for positions with these companies to be persuasive evidence that Claimant did not in fact diligently search for employment. Overall, based on Claimant's demeanor at the hearing and the foregoing evidence, I find that Claimant has not established that he diligently searched for, but was unable to secure, employment.

Therefore, in this case, I must now calculate Claimant's permanent partial disability benefits as of the date Employer established the availability of suitable alternate employment. Pursuant to Section 8(c)(21) of the Act, a claimant that experiences a loss in wage-earning capacity as a result of an unscheduled injury, is entitled to an award of permanent partial disability compensation based on the difference between his pre-injury average weekly wage ("AWW") and his post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21), (h). When calculating Claimant's benefits, Claimant's post-injury wage-earning capacity must be adjusted downward in order to account for inflation using the percentage change in the national average weekly wage.²⁰ *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In this case, Employer has established that Claimant's post-injury wage-earning capacity as of August 30, 2006 is \$286.67.²¹ Accordingly, based on the national average weekly wage,

¹⁹ *See, supra*, note 4.

²⁰ National average weekly wages can be located at: <http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm>.

Claimant's post-injury wage-earning capacity in 2002 dollars (the year of Claimant's injury) is \$257.95.²² Thus, when Claimant's post-injury wage-earning capacity, adjusted downward, is subtracted from his pre-injury average weekly wage of \$643.65 and then multiplied by two-thirds, Claimant's weekly compensation rate equals \$257.13.²³

ORDER

Accordingly, it is ORDERED that:

1. Employer Langley Aero Club shall pay Claimant temporary total disability benefits at a rate of \$429.10 per week from April 5, 2002 to April 11, 2002 and from July 3, 2002 to September 8, 2004; permanent total disability benefits at a rate of \$429.10 per week from September 9, 2004 to August 29, 2006; and permanent partial disability benefits at a rate of \$257.13 per week from August 30, 2006 to the present and continuing.
2. Employer Langley Aero Club is entitled to a credit for any and all compensation already paid.
3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).

²¹ In this case, as previously discussed, I find that Claimant is currently able to work and that there is suitable alternate employment available in the local labor market. Accordingly, I find that Claimant's current actual wage, which is zero dollars because Claimant is not working, does not fairly and reasonably represent Claimant's wage-earning capacity. Moreover, after reviewing the relevant evidence of record, as previously discussed, with respect to the factors and circumstances which may affect Claimant's capacity to earn wages in his disabled condition, *see* 33 U.S.C. § 908(h), I find that the average of the salaries of the jobs, which have been found to constitute suitable alternate employment in this case, most reasonably and fairly represents Claimant's wage-earning capacity.

\$240.00 (Jack's Towing) + \$320.00 (Budget) + \$300.00 (Avis) = \$860.00 / 3 = \$286.67. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65 (CRT)(5th Cir. 1998)(holding that averaging the salaries of the jobs identified as suitable alternate employment is a reasonable method for determining a Claimant's post-injury wage-earning capacity). Note, with regard to the Jack's Towing position, although a salary range of between \$6.00 to \$7.00 per hour is listed, *see* EX 13 and 14, \$6.00 was used to calculate Claimant's potential wage in view of the fact that Employer bears the burden of proof with regard to this issue. *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988)(holding that the "party that contends that the employee's actual earning are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity").

²² Thus, where "x" represents Claimant's post-injury wage-earning capacity in 2002 dollars:
$$\frac{\$483.04 \text{ (2002 NAWW)}}{\$536.82 \text{ (2006 NAWW)}} = \frac{x}{\$286.67} \rightarrow \$138,473.07 = \$536.82(x) \rightarrow x = \$257.95.$$

²³ \$643.65 (Claimant's pre-injury AWW) - \$257.95 (Claimant's post-injury adjusted average weekly wage-earning capacity) = \$385.7 x 2/3 = \$257.13.

4. Employer Langley Aero Club shall furnish medical care to Claimant pursuant to Section 7 of the Act.
5. All computations are subject to verification by the District Director.
6. Given the procedural history ascertained from the evidence introduced into the record, which may or may not represent a complete history in this case, Claimant's and Employer's counsel are invited to review *Wilson v. Virginia International Terminals*, 40 BRBS 46 2006) and the cases cited therein. Should Claimant's attorney feel that, under the circumstances of this case, an award of an attorney's fee will be in accordance with the Act and applicable case law, Claimant's counsel shall have 30 days to file his attorney fee petition, and Employer's counsel shall have 20 days, after receipt of that petition, to file objections thereto.

SO ORDERED.

A

Kenneth A. Krantz
Administrative Law Judge

KAK/mam
Newport News, Virginia